IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No 79-1171

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HANOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC. AND M-H PACKAGING SYSTEMS, INC.,

Respondents.

On Writ of Certiorari to the Minnesota Supreme Court

BRIEF *AMICUS CURIAE* BY THE SIERRA CLUB IN SUPPORT OF PETITIONER, THE STATE OF MINNESOTA

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TABLE OF CONTENTS

Page

Interest of the *Amicus Curiae* 1

Statement of the Case 2

Argument:

I. IF THERE EXISTS A "CONCEIVABLE BASIS" UPON WHICH TO ASSUME THE RATIONALITY OF A STATUTE ADDRESSING AN ECONOMIC OR SOCIAL PROBLEM, THE STATUTE MUST BE UPHELD AGAINST AN EQUAL PROTECTION ATTACK 3

II. A LEGISLATIVE BODY MAY PERMISSIBLY SELECT FOR REGULATION ONE OF SEVERAL EVILS CONTRIBUTING TO A PROBLEM, WITHOUT VIOLATION OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE 11

Conclusion 16

TABLE OF AUTHORITIES

Statutes:

42 U.S.C. §§ 7901-7942 (1979) 11
MINN. STAT. §§ 116F.21-.22 (1977) 2, 4, 16

Federal Decisions:

AFL v. American Sash & Door Co., 335 U.S. 538 (1949) 10
Allied Stores, Inc. v. Bowers, 358 U.S. 522 (1959) .. 6
Chem-Haulers, Inc. v. ICC, 594 F.2d 166 (5th Cir. 1979) 8
Dandridge v. Williams, 397 U.S. 471 (1970) ...6, 9, 12

Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) 8, 13
Exxon, Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 9
Independent Dairymen's Ass'n v. Denver, 142 F.2d 940 (10th Cir. 1944) 8
Lindsley v. Natural Carbonic Gas Co., 211 U.S. 61 (1911) 6
Mathews v. de Castro, 429 U.S. 181 (1976) 4, 13
McGinnis v. Royster, 410 U.S. 263 (1973) 10
Morey v Doud, 354 U.S. 457 (1957) 9
New Orleans v. Dukes, 427 U.S. 297 (1976) ... 4, 9, 15
Railway Express Agency v. New York, 336 U.S. 106 (1949) 12
United States v. Carolene Products, Co., 304 U.S. 144 (1938) 6, 13
Williamson v. Lee Optical, 348 U.S. 483 (1955) ... 9, 13

State Decisions:

American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. 618, 517 P.2d 691 (1973) 14
Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 105 A.2d 271 (1954) 14
Clover Leaf Creamery Co. v. Minnesota, 289 N.W.2d 79 (Minn. 1979) 3

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INTEREST OF THE *AMICUS CURIAE*

The Sierra Club, a non-profit California corporation with its principal place of business in San Francisco, California, is a national conservation organization with about 180,000 members. The purposes of the Sierra Club are: to enhance and protect natural resources and the human environment of the United States and the earth in general; to explore, enjoy and preserve scenic resources of the United States and its natural areas; to undertake and

to publish scientific, literary and educational studies concerning them; to educate with respect to forests, parks, monuments and other natural resources; and to enlist public interest and cooperation in protecting them.

In Minnesota, the Sierra Club operates through its North Star Chapter, which has approximately 3,000 members. On both the national and the local levels, the Sierra Club has been actively involved in issues of energy conservation, resource depletion, and solid waste management. In Minnesota, the Sierra Club participated in the legislative processes leading to the enactment of Minnesota's packaging statute, MINN. STAT. § 116F.01 *et. seq.*, and then again participated as an *amicus curiae* in defense of the statute and the underlying regulations at both the trial court and Minnesota Supreme Court levels, *see Can Manufacturers Institute v. Minnesota,* 289 N.W. 2d 416 (Minn. 1979).

The Sierra Club strongly supports the use of returnable containers for food, beverages, and other items wherever feasible. The Sierra Club does not support the use of either non-returnable paper milk containers or non-returnable plastic milk containers.

STATEMENT OF THE CASE

As part of a broad statutory scheme addressing the solid waste management problem in the state, the Minnesota Legislature on May 26, 1977, enacted Minn. Laws 1977, ch. 268 [MINN. STAT. §§ 116F.21-.22 (Supp. 1977)]. The statute bans the sale of milk in non-returnable, non-refillable plastic containers. On September 29, 1977, the plaintiffs filed suit, claiming, *inter alia,* that

the statute was an unconstitutional denial of equal protection in violation of the Fourteenth Amendment. The trial court, upon lengthy analysis of the evidence, concluded that the statute was unconstitutional on that basis, as well as on other grounds. The Minnesota Supreme Court, following an appeal by the State, held, in *Clover Leaf Creamery Co v. Minnesota*, 289 N.W.2d 79 (1979), that the statute denied plaintiffs equal protection of the law. After a detailed review and analysis of the evidence, the court found that "paper containers are not environmentally superior to plastic nonrefillables," and that, therefore, the State interest in banning plastic containers was speculative and illusory. 289 N.W.2d at 86. The court confined itself to an equal protection analysis, specifically declining to rule on the plaintiffs' Commerce Clause challenge.

The State petitioned this Court for a Writ of Certiorari, which was granted March 31, 1980.

ARGUMENT

I.

IF THERE EXISTS A "CONCEIVABLE BASIS" UPON WHICH TO ASSUME THE RATIONALITY OF A STATUTE ADDRESSING AN ECONOMIC OR SOCIAL PROBLEM, THE STATUTE MUST BE UPHELD AGAINST AN EQUAL PROTECTION ATTACK.

To reach their decisions in the instant case, both the trial court and the Minnesota Supreme Court weighed the evidence (which compared non-returnable plastic containers with non-returnable paper-board containers), rejected portions of the evidence (such as the Midwest Research

Institute and United States Environmental Protection Agency reports), and then concluded that plastic milk containers were no worse than paper milk containers. Had those two courts been vested by the Minnesota electorate with legislative powers, it would have been within their domain to produce an enactment different than that embodied in MINN. STAT. §§ 116F.21-22. It is apparent that the two courts disagreed with the Legislature's judgment to ban plastic milk containers. However, fundamental concepts of separation of powers, judicial review, and equal protection prohibit these two lower courts from engaging in the superlegislative function which they have undertaken in this case.

First and foremost of these fundamental concepts is the statement of this Court in *New Orleans v. Dukes*, 472 U.S. 297, at 303 (1976):

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, *our decisions presume the constitutionality of the statutory discriminations* and require only that the classification challenged be rationally related to a legitimate state interest. (Emphasis added.)

Accord, Mathews v. de Castro, 429 U.S. 181 (1976). This rule, with its long established application in the area of local economic regulation, recognizes, by its terms, that discriminations logically flow from much legislation. The issue then is not whether a discrimination between paper and plastic containers exists by virtue of the statute: the question is whether the singling out of plastic containers is rationally related to a legitimate state purpose. If so, it matters not that there is a discrimination.

There is no issue in this case with respect to the requisite legitimacy of the statute's purpose. The Minnesota Supreme Court, at 289 N.W.2d 82, stated, "the Act undoubtedly deals with legitimate state interests." The court acknowledged the legitimacy of the legislative attempt to reduce solid waste management problems, to reduce energy waste, and to preserve natural resources. The court also agreed with the legislative conclusion that refillable milk containers are clearly preferable given those legislative purposes. The difficulty in this case grows from the court's detailed comparison of the evils attributable to the plastic container versus the ills attributable to the paperboard container. In its opinion, the plastic containers were not less environmentally damaging than paper containers, and therefore could not be separately banned without violation of the Equal Protection Clause. It was upon this premise—that the plastic container is not the worse of the two—that the court decided there was no rational relationship between the means and the end, as set forth in the statute.

The course taken by the Minnesota Supreme Court in reaching this decision violates the basic propositions of equal protection analysis in these respects:

(a) the court failed to apply the "conceivable basis" test in deciding whether the ban rationally relates to the statutory purpose; and

(b) instead of so doing, the court overstepped its bounds by weighing the evidence and acting as a factfinder.

When presented with an equal protection attack upon a statute which regulates in the field of economic or so-

cial problems, a reviewing court must, in order to effectuate the strong presumption of constitutionality, search for any conceivable state of facts which would sustain the enactment, even if that state of facts must be assumed in order to do so. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Allied Stores, Inc. v. Bowers*, 358 U.S. 522 (1959); *United States v. Carolene Products, Co.*, 304 U.S. 144 (1938); and *Lindsley v. Natural Carbonic Gas Co.*, 211 U.S. 61 (1911).

Although it is constitutionally necessary that the reviewing court search for this "conceivable" supporting basis, the Minnesota Supreme Court neglected to do so. Rather than assume facts in support of the statute's validity, the court assumed facts against its validity. For example, the court speculated that the total solid waste problem attributable to milk containers would never be solved because neither the state pollution control agency nor the state legislature could be said to have comprehensive programs in the offing. Based upon this speculation, the court further speculated that paper containers will continue to be used, and that therefore the ban on plastic containers is not rationally related to the purpose of the statute.

The court also noted that the original draft of the plastic ban contained a ban on paper containers as well, but that the latter was excised from the bill. This proves nothing. The proper application of the "conceivable basis" test suggests that the Legislature may have decided to wait until a later date to address the more complex problems of banning paper cartons. The Legislature may have considered issues such as greater potential job dislocation with a paper ban. Certainly, negative inferences which might vitiate the statute cannot permissibly be drawn from this observation by the court.

Such a process of speculation is exactly the reverse of what is required under economic equal protection analysis.

While engaging in this process, the court neglected to recognize several important considerations, at least hypothetical if not factual in nature, which might justify the Legislature's enactment. For instance, the court failed to take into account the fact that plastics are derived from petroleum and petroleum products, themselves non-renewable resources, while paper is derived from a renewable resource—trees. So in its conclusion that paper containers require more total energy for their production than plastic, the court failed to consider the possibility that the Legislature balanced the higher consumption of a renewable energy source against lower consumption of a non-renewable source, and decided in favor of the former. Reliance on energy from renewable biomass sources such as trees promotes the Legislatures' legitimate goal of reducing the depletion of non-renewable resources. Additionally, even if a ban on plastics will not increase the amount of natural gas or petroleum available for heating and fuel purposes, 289 N.W.2d at 85, it could conceivably reduce the total consumption of such resources. Reduced use of expensive fossil fuels is in keeping with the statute's purpose.

Furthermore, the Legislature might have found, based upon government studies, that the plastic containers were only recently introduced to the Minnesota market and, relatively speaking, had a lesser foothold in the marketplace than paper containers. With the comparative lesser degree of dependence (both by industry and consumers) on the plastic container, the Legislature might have con-

ceived that its prompt elimination from the market would be less disruptive than a later ban. As stated by Ms. Justice Wahl in her dissenting opinion, "The Legislature could rationally conclude that allowing the plastic non-refillables to become entrenched in Minnesota would hinder further efforts to force the dairy industry to utilize more environmentally acceptable containers." 289 N.W.2d at 87. In making its decision, the Legislature did remove at least one of several non-refillable, non-returnable containers from the waste stream, which is in accord with the statute's purpose. The fact that the two lower courts found the evidence to support the use of plastic over paper containers only signals the disagreement of those courts with the Legislature.

In so disagreeing, the lower courts have violated another tenet of judicial review when equal protection claims are asserted. Specifically, the courts have impermissibly re-weighed the evidence and analyzed the soundness of the legislative decision. This has consistently been construed as going beyond the "conceivable basis" decision. If there is any conceivably reasonable basis for the legislative decision, the reviewing court must stop there. Whether the court would have made the same decision on the same set of facts, had it been in the legislative role, is not the proper inquiry. If it is even "debatable" that the legislative decision can be justified, it must stand. "If our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision." *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, at 425 (1952). *Accord, Chem-Haulers, Inc. v. ICC,* 594 F.2d 166 (5th Cir. 1979), and *Independent Dairymen's Ass'n v. Denver,* 142 F.2d 940 (10th Cir. 1944).

In fact, it does not affect the constitutionality of the statute if the evidence of record suggests that the "ultimate efficacy" of achieving the statutory purpose is in question, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (challenged whether a proscription on oil producers and refiners owning gas stations would really foster sales competition); or that the means to achieve the statutory end is rough, illogical, or not the best available. *Dandridge v. Williams*, 397 U.S. 471 (1970) (challenged whether a $250 ceiling per family in AFDC payments was permissible regardless of family size or need); or that the means stated in the statute is not in all ways perfectly consistent with the desired result, *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (challenged whether a regulation on visual care in fact contributed to public health). It is evident from this mere sampling of cases that great latitude is permitted a legislative body in molding solutions to societal ills. The success of the program need not be guaranteed in advance.

If a court should sense that the evidence indicates potential failure of the program, that is an insufficient basis for overturning the legislation. A factual analysis of that nature is outside the parameters of equal protection analysis. In fact, this Court, in *New Orleans v. Dukes*, 472 U.S. 297 at 306, overruled *Morey v. Doud*, 354 U.S. 457 (1957), precisely because the Court there over-indulged in factfinding. In overruling it, this Court noted that *Morey* was "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds." *Id.* at 306.

This line of cases, which proscribes the exhaustive sort of evidentiary review which undergirds the Minnesota Su-

preme Court's opinion, derives largely from the theory of separation of powers. Deference to the legislative branch, and respect for the factual, political, and social complexities of the legislative process are fundamental

> Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates proper democratic government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people.

AFL v. American Sash & Door Co., 335 U.S. 538, at 553 (1949), (J. Frankfurter, *concurring). See also McGinnis v. Royster,* 410 U.S. 263 at 277 (1973).

Second-guessing of the legislative branch by the judicial is improper in an equal protection case, and it is upon this reasoning and precedent that the ban against a court acting as a "superlegislature" is premised. Because the "superlegislative" role is the only conceivable means by which the Minnesota Supreme Court could have reached its decision below, that decision must be reversed.

II.

A LEGISLATIVE BODY MAY PERMISSIBLY SELECT FOR REGULATION ONE OF SEVERAL CONTRIBUTING EVILS TO A PROBLEM, WITHOUT VIOLATION OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

The opinion of the Minnesota Supreme Court indicates that the Legislature could not constitutionally ban plastic milk containers if it did not also ban paper milk containers. It specifically found that plastic containers are not environmentally more harmful than paper containers. This approach creates a serious question about the scope of legislative powers. Is a legislative body powerless to enact remedial measures in response to a given problem, if it does not simultaneously regulate all contributing causes of the problem? Is it powerless to regulate one known toxic effluent just because another such effluent is as yet unregulated? Must the legislative body of necessity engage in lengthy studies to scientifically ascertain which component of air pollution is most noxious before it may regulate any noxious components? Must it forego its regulation of uranium tailing deposits (*see* 42 U.S.C. §§ 7901-7942 (Supp. 1977)) because it has not yet spoken with respect to asbestos tailing deposits, when both are known health hazards? With such requirements, the flexibility essential to sound environmental legislation would be destroyed. Environmental regulation virtually always involves questions of economics and degrees of harm, and the balancing of one against the other. This complex, sensitive, and very political process is difficult enough when a single problem is in issue. To require that all evils contributing to a certain

environmental problem be regulated similarly and simultaneously would prove a straggering blow to the progress of economical, feasible, and sensible environmental lawmaking.

This Court has ruled repeatedly, and in a variety of economic equal protection cases, that the Equal Protection Clause does not require that "all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York,* 336 U.S. 106, at 110 (1949). In that case, in fact, the Court stated that one evil may be regulated even though a more serious evil goes unregulated. The regulation there in issue was a traffic rule that barred the use of space on a vehicle for advertising purposes, on the theory that such advertising was a distraction and road hazard. The rule excepted the owners of business delivery vehicles, who were permitted to use space on their own vehicles for their own advertising. The rule was upheld against an equal protection claim by a truck owner who sold advertising space on his trucks. The decision clearly permits a legislative body to proceed step-by-step to address a matter of concern, even if it does not address all, or even a large part, of the problem. The Court in *Railway Express* did not inquire, for example, whether and to what degree the travels of vehicles with rented advertising constituted a greater threat to traffic safety than the travels of vehicles carrying only their owners' advertising. Nor did the Court examine the entire problem of the distraction caused by advertisement, to determine whether the city had gone far enough in eliminating the threat to traffic safety by banning advertisement on vehicles alone, as opposed to that on billboards, walls, or other fixed objects. *Accord, Dandridge v. Williams,* 397 U.S. 471, at 486-87 (1970).

The constitutional question is not whether the regulation has struck at the worst evil, or whether it has filtered out all possible sources of the evil. *Mathews v. de Castro,* 429 U.S. 181, at 189 (1976); *United States v. Carolene Products, Co.,* 304 U.S. 144, at 151 (1938).

The extent to which a legislative body decides to address a problem, and the classifications it makes in reaching those decisions, are solely within the discretion of the Legislature, so long as they are rationally related to the resolution of the problem. A legislature may experiment if it wishes; it may decide on a gradual, incremental program; or it may decide on a wholesale program; it may decide to take on an evil of smaller magnitude than others to ascertain how the program functions; or it may decide to take on the larger evil, to create a more substantial impact. As the Court stated in *Day-Brite:*

> [S]tate legislatures have constitutional authority to experiment with new techniques: they are entitled to their own standard of the public welfare; they may within *extremely broad limits* control practices . . . so long as specific constitutional provisions are not violated and so long as conflicts with valid and controlling federal laws are avoided.

342 U.S. at 423 (*emphasis added*).

In *Williamson,* it stated.

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative

> mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

348 U.S. at 489 (citation omitted).

It is apparent in this case, by the nature of the problem itself, that the legislative approach was to take one step at a time. Reduction of the types and amounts of material entering the solid waste stream is a sizeable undertaking of questionable potential success in this modern disposable society. To focus first on businesses whose products find their way into a majority of American homes, and to discourage the deposit of those containers into the solid waste stream is certainly a logical beginning.

Markedly similar patterns have been upheld against equal protection attacks in the area of mandatory deposit regulations on beverage containers. The Oregon Court of Appeals, in *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 517 P.2d 691 (1973), acknowledged that the statute singled out beer and carbonated beverage containers, when myriad other beverage containers also added to the litter and solid waste problems of the state. Nevertheless, the court said, "The fact that other containers may also create litter and solid waste does not invalidate the legislature's intent to deal with this species of solid waste and litter." *Id.* at 704. Even more akin to the case at bar is *Anchor Hocking Glass Corp. v. Barber*, 118 Vt. 206, 105 A.2d 271 (1954). In that case, as in this, the legislative body attempted to get prompt regulatory control over a newly growing problem. There, the trend was an increase in the use of non-returnable beverage containers in the early 1950's, whereas here, the trend is toward a proportionate increase in the number

of dairies investing in plastic filler machinery along with the increasing purchases of milk in plastic non-refillable containers. In upholding the Vermont statute which banned the sale of beer in non-returnable glass containers, the Vermont Supreme Court took special note of the trend, and found that there was no denial of equal protection.

This same type of reasoning prevailed in *New Orleans v. Dukes*, where a grandfather clause, eliminating all but two street vendors from the French Quarter, was assailed on equal protection grounds. 427 U.S. 297 (1976). Even though the two vendors who were excused from operation of the ordinance were granted a monopoly of sorts, the Court noted that it was rationally permissible to eliminate vendors of more recent vintage. That was the case even though there was nothing of record to indicate that those two vendors would operate more consistently with the traditions of that unique part of New Orleans. So, even though the paper cartons may consume proportionately more of the market in Minnesota as a result of the Act, and even though they may be no better environmentally than the plastic cartons, this is insufficient to make out a denial of equal protection. The Minnesota Legislature's step-by-step approach of last-in, first-out was constitutionally sanctioned in *Dukes*, and that reasoning was an essential aspect of the *Dukes* holding. That same rationale is both sufficient and applicable, so that it may serve as the dispositive basis in this case.

By virtue of these authorities, and their application to this case, it is readily apparent that the Minnesota Legislature acted well within the confines of the equal protection doctrine when it chose to ban plastic non-refillable, non-returnable milk containers. It is clear that the exclu-

sion of paper-board milk containers from this ban is not reason enough to invalidate the environmentally sound step taken by the Legislature in its enactment of MINN. STAT. §§ 116F.21-22

CONCLUSION

Because the lower courts decided this case in the role of "superlegislatures," only after an exhaustive analysis and interpretation of the evidence, they failed to accord MINN. STAT. §§ 116F.21-22 the strong presumption of constitutionality owed it under the law. Because the statute can reasonably be viewed as an attempt to remove an environmentally objectionable and relatively new, non-returnable, non-refillable container from the marketplace before it became firmly entrenched, there is a conceivable basis upon which it must be sustained. This must be so even if the lower courts find that to be an unwise decision, an incomplete approach to the problem, or suspect it to be ultimately ineffectual.

The fact that paper non-returnable, non-refillable milk containers fall outside the ban does not protect the plastic containers against the decision of the Legislature. This is so because, under the law, the legislative branch is vested with broad-ranging authority to approach a problem, such as solid waste management, in any variety of ways. That the Minnesota Legislature chose to do so by the exclusion of a single product from the marketplace is not the equivalent of a denial of equal protection.

The Sierra Club, as *amicus curiae*, respectfully urges

the Court to reverse the holding of the Minnesota Supreme Court herein.

Respectfully submitted,

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